No. 99-1342

IN THE

# Supreme Court of the United States

GEORGE HILL,

*Petitioner,*

*v.*

DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR and AVONDALE INDUSTRIES, INC.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## BRIEF IN OPPOSITION FOR RESPONDENT AVONDALE INDUSTRIES, INC.

JOSEPH J. LOWENTHAL, JR.
*Counsel of Record*
JONATHAN H. SANDOZ
JONES, WALKER, WAECHTER, POITEVENT, CARRÈRE & DENÈGRE, LLP
*Attorneys for Respondent Avondale Industries, Inc.*
201 St. Charles Avenue
New Orleans, LA 70170
(504) 582-8000

158311

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

## QUESTION PRESENTED

Whether the United States Court of Appeals for the Fifth Circuit correctly held that an untimely, perempted claim for Louisiana Workers' Compensation benefits does not toll the statute of limitations for filing a claim pursuant to the Longshore and Harbor Workers' Compensation Act.

## STATEMENT PURSUANT TO RULE 29.6

Respondent, Avondale Industries, Inc., is a wholly owned subsidiary of Litton Industries Inc. which is publicly traded.

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## STATEMENT OF THE CASE

On June 24, 1992, Petitioner, George Hill, filed a claim for compensation and medical benefits pursuant to the Longshore and Harbor Workers' Compensation Act against Respondent, Avondale Industries, Inc., for an alleged back injury sustained approximately twelve years earlier on October 1, 1980.

Following the alleged accident and injury of October 1, 1980, Hill's first legal action was to file a petition in the 24th Judicial District Court for the Parish of Jefferson, State of Louisiana, on February 21, 1984, alleging entitlement to workers' compensation benefits pursuant to the Louisiana Workers' Compensation Act. The Louisiana Workers' Compensation Act provides, in all cases, "the claim for payment shall be *forever barred* unless the proceedings have been begun within two years from the date of the accident." (emphasis added). La. R.S. 23:1208.2. Accordingly, Respondent asserted that the claim was time-barred and, on June 26, 1991, the Louisiana district court dismissed the claim for compensation pursuant to Louisiana law. Petitioner appealed to the Louisiana Fifth Circuit Court of Appeals which affirmed the judgment of the district court with written reasons on February 25, 1992. On October 2, 1992, the Louisiana Supreme Court unanimously denied Petitioner's writ of certiorari and/or review, and on November 6, 1992, Petitioner's application for reconsideration was also unanimously denied by the Louisiana Supreme Court.

It was not until June 24, 1992, and approximately 12 years post-accident, that Petitioner filed his claim for compensation pursuant to the Longshore and Harbor Workers' Compensation Act. The claim for compensation proceeded to formal hearing on February 8-9, 1996, and the Administrative Law Judge denied Petitioner's claim

for compensation as untimely filed pursuant to 33 U.S.C. § 913(a). Petitioner was awarded medical benefits pursuant to 33 U.S.C. § 907.

The only ruling of the Administrative Law Judge which has been made subject of Petitioner's appeals or applications for post-judgment relief is the ruling that his claim for compensation, filed more than 12 years post-accident, was untimely pursuant to § 913(a).

The decision and order as outlined above by the Administrative Law Judge was appealed to the Benefits Review Board on July 2, 1997. On August 4, 1998, the Board affirmed the Administrative Law Judge's ruling that Petitioner's claim for longshore compensation pursuant to the Longshore and Harbor Workers' Compensation Act was time barred under 33 U.S.C. § 913(a). Petitioner subsequently appealed to the United States Court of Appeals for the Fifth Circuit, which also affirmed that Petitioner's claim for compensation was time barred pursuant to § 913(a). Petitioner now seeks consideration from this Court of issues which, for the following reasons, have no merit and should not be addressed.

## REASONS FOR DENYING THE WRIT

As admitted by Petitioner, at the time he decided to pursue a remedy for his alleged accident and injury pursuant to a workers' compensation scheme, there was a dual remedy available to him, i.e., he had the option of filing pursuant to either the Louisiana Workers' Compensation Act or the Longshore and Habor Workers' Compensation Act. *See Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 100 S. Ct. 2432, L. Ed. 2d 458 (1980). In fact, Petitioner could have

simultaneously filed both claims.[1] Despite this freedom of choice, Petitioner chose not to seek a remedy pursuant to Longshore and Harbor Workers' Compensation Act, and instead chose to file only a claim pursuant to the Louisiana Workers' Compensation Act. However, for unexplained reasons, Petitioner failed to file the state workers' compensation claim within the clear and expressed two year peremptive period provided by Louisiana law. La. R.S. 9:23:1209(A); *Ancor v. Belden Concrete Products, Inc.*, 256 So. 2d 122 (La. 1971) (held: the two year period provided by La. R.S. 23:1209(A) is a peremptive period). In Louisiana law, a lapse of the peremptive period operates as a complete extinguishment of the cause of action such that there is no substantive right which exists to be enforced. *Equilease Corp. v. M/V SAMPSON*, 756 F.2d 357 (5th Cir. 1985); *KSLA-TV, Inc. v. Radio Corp. of America*, 732 F.2d 441 (5th Cir. 1984). Because a peremptive period sets forth the time period that a right exists to be enforced, "the right is extinguished upon the expiration of the peremptive period" and the "cause of action or substantive right no longer exists to be enforced." La. Civ. Code art. 3458; *Ancor*, 256 So. 2d at 381; *Pounds v. Schori*, 377 So. 2d 1195, 1198 (La. 1979).

Based upon the foregoing, Petitioner's right to be file a claim pursuant to the Louisiana Workers' Compensation Act was extinguished prior to the filing of his claim. Thus, there was no right to be enforced, and upon filing, there was no reason for Respondent to address the merits of the claim.

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1. Just prior to his alleged back injury, Petitioner filed suit against Respondent for an alleged occupational lung disease claim in Louisiana state court and simultaneously pursued a claim under the Longshore and Harbor Workers' Compensation Act. Accordingly, Petitioner was well aware of the remedies available to him.

It is undisputed that Petitioner's claim pursuant to the Longshore and Harbor Workers' Compensation Act was not filed until June 24, 1992, roughly twelve years post-accident. Thus, standing alone, the Longshore and Harbor Workers' Compensation Act claim was time barred pursuant to 33 U.S.C. § 913(a). Petitioner argues that the one year limitation should be tolled by virtue of § 913(d), which provides:

> Where recovery is denied to any person in a suit brought at law or in admiralty to recover damages in respect of injury or death, on the ground that such person was an employee and the defendant was an employer within the meaning of this chapter and that such employer had secured compensation to such employee under this chapter, the limitation of time . . . shall begin to run only from the date of termination of such suit.

Petitioner argues that despite the fact that his claim for compensation pursuant to the Louisiana Workers' Compensation Act was *untimely* and *without legal effect*, it should operate to toll the statute of limitations pursuant to §§ 913(a) and (d). Thus, Petitioner argues that any earlier filed claim of any nature or kind should operate to toll the statute of limitations as set forth in § 913(a) provided that such earlier filed claim or lawsuit was brought within the statute of limitations provided by § 913(a). Absolutely no authority exists for such an interpretation, and in fact, that interpretation is contrary to the plain language of the statute and would be in complete contravention to the basic purpose of the tolling provision.

## I.

## THE PLAIN LANGUAGE OF 22 U.S.C. § 913(b) RENDERS IT INAPPLICABLE TO THE INSTANT CASE

According to the *plain* and *unambiguous* language of § 913(d), the limitation period contained in § 913(a) is only tolled when certain conditions are met, i.e.: (1) a suit must have been brought at law or in admiralty to recover damages; (2) recovery must have been denied; and (3) the denial must have been "*on the ground*" that the claimant was an employee and the defendant was an employer within the meaning of the Longshore and Harbor Workers' Compensation Act and that the defendant had secured compensation benefits to such employee pursuant to the Longshore and Habor Workers' Compensation Act. 33 U.S.C. § 913(d).

"Congress intends the words of its enactments to carry their ordinary, contemporary, common meaning." *United States v. Gray*, 96 F.3d 767, 774 (5th Cir. 1996). The statute itself is the "sole repository of congressional intent where the statute is clear and does not demand an absurd result." *In Re Abbott Laboratories*, 51 F.3d 524, 529 (5th Cir. 1995), *citing West Virginia Univ. Hosp., Inc. v. Casey*, 499 U.S. 83, 99-100, 111 S. Ct. 1138, 1147, 113 L. Ed. 2d 68 (1991). Congress could have provided that the one year statute of limitation contained in § 913(a) is tolled at any time a suit is brought at law or in admiralty for recovery or damages; however, it chose not to do so. Congress went on to delineate, with specificity, that the tolling provision was *only* applicable when a denial of recovery of damages is based upon a defendant's statutory immunity pursuant to the Longshore and Harbor Workers' Compensation Act.

This makes total sense. In a precautionary suit at law or in admiralty, the defense of the defendant will be statutory immunity pursuant to the Longshore and Harbor Workers' Compensation Act. The defendant will then be urging its statutory immunity pursuant to the Longshore and Habor Workers' Compensation Act and conceding that the merits are to be addressed by a claim pursuant to that Act.

Since Petitioner's state workers' compensation claim was dismissed on grounds of peremption, *i.e.*, that the right no longer existed at the time of filing, it was not a denial of recovery due to the exclusivity of the Longshore and Harbor Workers' Compensation Act. Thus, the § 913(d) tolling provision does not apply.

## II.

## THE PEREMPTED STATE WORKERS' COMPENSATION CLAIM CANNOT SERVE TO TOLL THE ONE YEAR STATUTE OF LIMITATIONS PURSUANT TO 33 U.S.C. § 913(d)

Petitioner argues that even the filing of a claim based upon a right that does not even exist serves to toll the one year limitations provided by the Longshore and Harbor Workers' Compensation Act. There is no support for this interpretation, and Petitioner's interpretation contravenes the purpose and policy of statutes of limitation as well as the purpose of tolling provisions pursuant to federal law.

No court has ever held that an *untimely* state law claim can serve as a basis to toll the applicable statute of limitations on a similar, or even identical, federal law claim. *See, e.g., Drumm v. Sizeler Realty Co., Inc.*, 817 F.2d 1195

(5th Cir. 1987) (held: an untimely lawsuit in Louisiana state court pursuant to Louisiana antitrust law could not operate to toll the statute of limitations for a federal lawsuit, later brought in federal court, based upon federal antitrust law). To hold that an untimely claim is sufficient would contravene the purpose and policy of all statutes of limitation as set forth by this Court and all others to have addressed the issue. When the underlying state law claim is *untimely*, there is no need or impetus for the defendant to gather evidence and investigate the merits of the claim. The defendant then only needs to address the timeliness of the state law claim and have it dismissed on that basis, especially when clearly and expressly governed by a peremptive period which is not subject to tolling, suspension or interruption.

In the instant case, Petitioner's remedy pursuant to the state workers' compensation scheme was extinguished by his own inaction. He had no right under Louisiana law to file the petition. Due to the absolute loss of the right, the petition was untimely as a matter of law, and Respondent had no impetus to investigate the claim and gather evidence in its defense.

Since Petitioner's position is contrary to the purpose of statutes of repose, he makes a "last-ditch" attempt by arguing that the Fifth Circuit deprived him of "his Constitutional rights by retroactively changing its application of the law." As set forth below, there is no merit to this argument.

Petitioner claims that there was "well established jurisprudence" which provided that his untimely state compensation claim would toll the statute of limitations set forth in § 913(a). Petitioner cites *Ingalls Shipbuilding Div., Litton Systems, Inc. v. Hollinhead*, 571 F.2d 272 (5th Cir.

1978) and *Calloway v. Zigler Shipyards, Inc.*, 16 B.R.B.S. 175, 177 (1984) as this "well established jurisprudence." However, these cases are easily distinguishable. In *Hollinhead*, the only issue was whether a *timely* workers' compensation claim qualified to toll the applicable statute of limitations. *Hill*, 195 F.3d 790, 793. Likewise, in *Calloway*, the plaintiff's first attempt to receive benefits, via an admiralty suit, was *timely*. Thus, Petitioner's argument that the foregoing jurisprudence constituted a clear rule of law applicable to the instant case has no merit. There was no jurisprudence even suggesting that an untimely and perempted state compensation claim tolls the applicable limitations period. Thus, there was no retroactive change in the law which could even arguably amount to a deprivation of a Constitutional right.

Petitioner further argues that his position is necessary to achieve uniformity. There is likewise no merit to that argument. Petitioner asserts that the timeliness of the underlying state claim should not be considered in application of § 913(d)'s tolling provision because to do so would render "harsh and incongruous" results. Petitioner suggests that any claim or suit should be sufficient to toll the statute of limitation if it is filed within the time prescribed by § 913(a). This unsupported theory would lead to absurd results.

There is often doubt whether the Longshore and Harbor Workers' Compensation Act covers an employee, and that determination is often a very close call. Accordingly, a claimant could have a good faith belief that he is a Jones Act seaman and could file a Jones Act lawsuit which carries a statutory three year limitations period. If the claimant files a Jones Act lawsuit two or even three years post-accident

and loses the issue of seaman's status due to a jury's determination that plaintiff is a longshoreman, then under Petitioner's rationale, he would be forever barred from asserting a claim pursuant to the Longshore and Harbor Workers' Compensation Act since the Jones Act suit was not brought within one year of the date which he became aware of his disability. This result would necessarily superimpose § 913(a)'s statute of limitations upon every legal remedy which could arguably provide a basis for recovery to the claimant. This could not have been the intent of § 913(d).

If Congress had intended such a result, it could have easily stated in § 913(d) that any suit shall toll the prescriptive period if brought within the time prescribed by § 913(a). Congress chose not to do so for obvious reasons.

Petitioner makes issue of what he considers to be a harsh and incongruous result. However, Petitioner fails to realize that there was no impediment to his asserting a claim pursuant to a Longshore and Harbor Workers' Compensation Act. As Petitioner admits in brief, he had the option of pursuing claims pursuant to either state compensation law or the Longshore and Harbor Workers' Compensation Act. He could have also simultaneously filed both claims. For whatever reason, strategic, tactical or otherwise, plaintiff chose to proceed pursuant to state law. It was only once Petitioner was cognizant of his lack of diligence and mistake of applicable law, that he elected to pursue a LHWCA claim. This lack of diligence, as the Fifth Circuit correctly held, should not be rewarded.

## CONCLUSION

For the foregoing reasons, the Petition for Writ of certiorari should be denied. Petitioner has not raised any issue worthy of consideration by this Court. There was no deprivation of Constitutional rights, and the results of the lower courts are completely consistent with applicable law and the clear intent of Congressional enactments. Petitioner is simply seeking to redress his mistakes at the extreme expense of defendant which according to all lower courts, is absurd.

Respectfully submitted,

JOSEPH J. LOWENTHAL, JR.
*Counsel of Record*
JONATHAN H. SANDOZ
JONES, WALKER, WAECHTER,
POITEVENT, CARRÈRE
& DENÈGRE, LLP
*Attorneys for Respondent*
*Avondale Industries, Inc.*
201 St. Charles Avenue
New Orleans, LA 70170
(504) 582-8000